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HOUSE BILL NO. 2258

Offered January 15, 2013

A BILL to amend and reenact §§ 56-560, 56-563, 56-566, and 56-575.6 of the Code of Virginia, relating to the Public-Private Transportation Act of 1995 and the Public-Private Education Facilities and Infrastructure Act of 2002; affected local jurisdictions; approval of certain comprehensive agreements.

 Patron—James

 Referred to Committee on Transportation

Be it enacted by the General Assembly of Virginia:

1. That §§ 56-560, 56-563, 56-566, and 56-575.6 of the Code of Virginia are amended and reenacted as follows:

§ 56-560. Approval by the responsible public entity.

A. The private entity may request approval by the responsible public entity. Any such request shall be accompanied by the following material and information unless waived by the responsible public entity in its guidelines or other instructions given, in writing, to the private entity with respect to the transportation facility or facilities that the private entity proposes to develop and/or operate as a qualifying transportation facility:

1. A topographic map (1:2,000 or other appropriate scale) indicating the location of the transportation facility or facilities;

2. A description of the transportation facility or facilities, including the conceptual design of such facility or facilities and all proposed interconnections with other transportation facilities;

3. The proposed date for development and/or operation of the transportation facility or facilities along with an estimate of the life-cycle cost of the transportation facility as proposed;

4. A statement setting forth the method by which the private entity proposes to secure any property interests required for the transportation facility or facilities;

5. Information relating to the current transportation plans, if any, of each affected jurisdiction;

6. A list of all permits and approvals required for developing and/or operating improvements to the transportation facility or facilities from local, state, or federal agencies and a projected schedule for obtaining such permits and approvals;

7. A list of public utility facilities, if any, that will be crossed by the transportation facility or facilities and a statement of the plans of the private entity to accommodate such crossings;

8. A statement setting forth the private entity's general plans for developing and/or operating the transportation facility or facilities, including identification of any revenue, public or private, or proposed debt or equity investment or concession proposed by the private entity;

9. The names and addresses of the persons who may be contacted for further information concerning the request;

10. Information on how the private entity's proposal will address the needs identified in the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency; and

11. Such additional material and information as the responsible public entity may reasonably request pursuant to its guidelines or other written instructions.

B. The responsible public entity may request proposals from private entities for the development and/or operation of transportation facilities. The responsible public entity shall not charge a fee to cover the costs of processing, reviewing, and evaluating proposals received in response to such requests.

C. The responsible public entity may grant approval of the development and/or operation of the transportation facility or facilities as a qualifying transportation facility if the responsible public entity determines that it serves the public purpose of this chapter. The responsible public entity may determine that the development and/or operation of the transportation facility or facilities as a qualifying transportation facility serves such public purpose if:

1. There is a public need for the transportation facility or facilities the private entity proposes to develop and/or operate as a qualifying transportation facility;

2. The transportation facility or facilities and the proposed interconnections with existing transportation facilities, and the private entity's plans for development and/or operation of the qualifying transportation facility or facilities, are, in the opinion of the responsible public entity, reasonable and will address the needs identified in the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency;

59 3. The estimated cost of developing and/or operating the transportation facility or facilities is
60 reasonable in relation to similar facilities; and

61 4. The private entity's plans will result in the timely development and/or operation of the
62 transportation facility or facilities or their more efficient operation.

63 In evaluating any request, the responsible public entity may rely upon internal staff reports prepared
64 by personnel familiar with the operation of similar facilities or the advice of outside advisors or
65 consultants having relevant experience.

66 D. The responsible public entity may charge a reasonable fee to cover the costs of processing,
67 reviewing, and evaluating the request submitted by a private entity pursuant to subsection A, including
68 without limitation, reasonable attorney's fees and fees for financial and other necessary advisors or
69 consultants. The responsible public entity shall also develop guidelines that establish the process for the
70 acceptance and review of a proposal from a private entity pursuant to subsections A and B. Such
71 guidelines shall establish a specific schedule for review of the proposal by the responsible public entity,
72 a process for alteration of that schedule by the responsible public entity if it deems that changes are
73 necessary because of the scope or complexity of proposals it receives, the process for receipt and review
74 of competing proposals, and the type and amount of information that is necessary for adequate review of
75 proposals in each stage of review. *In addition, such guidelines shall require that a final environmental*
76 *impact study required by the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., as amended,*
77 *be completed prior to commencing project development.*

78 For qualifying transportation facilities that have approved or pending state and federal environmental
79 clearances, secured significant right of way, have previously allocated significant state or federal
80 funding, or exhibit other circumstances that could reasonably reduce the amount of time to develop
81 and/or operate the qualifying transportation facility in accordance with the purpose of this chapter, the
82 guidelines shall provide for a prioritized documentation, review, and selection process.

83 E. The approval of the responsible public entity shall be subject to the private entity's entering into
84 an interim agreement or a comprehensive agreement with the responsible public entity. For any project
85 with an estimated construction cost of over \$50 million, the responsible public entity also shall require
86 the private entity to pay the costs for an independent audit of any and all traffic and cost estimates
87 associated with the private entity's proposal, as well as a review of all public costs and potential
88 liabilities to which taxpayers could be exposed (including improvements to other transportation facilities
89 that may be needed as a result of the proposal, failure by the private entity to reimburse the responsible
90 public entity for services provided, and potential risk and liability in the event the private entity defaults
91 on the comprehensive agreement or on bonds issued for the project). This independent audit shall be
92 conducted by an independent consultant selected by the responsible public entity, and all such
93 information from such review shall be fully disclosed.

94 F. In connection with its approval of the development and/or operation of the transportation facility
95 or facilities as a qualifying transportation facility, the responsible public entity shall establish a date for
96 the acquisition of or the beginning of construction of or improvements to the qualifying transportation
97 facility. The responsible public entity may extend such date from time to time.

98 G. The responsible public entity shall take appropriate action, as more specifically set forth in its
99 guidelines, to protect confidential and proprietary information provided by the private entity pursuant to
100 an agreement under subdivision 11 of § 2.2-3705.6.

101 H. The responsible public entity may also apply for, execute, and/or endorse applications submitted
102 by private entities to obtain federal credit assistance for qualifying projects developed and/or operated
103 pursuant to this chapter.

104 **§ 56-563. Affected local jurisdictions; approval of certain comprehensive agreements.**

105 A. Any private entity requesting approval from, or submitting a proposal to, a responsible public
106 entity under § 56-560 shall notify each affected jurisdiction by furnishing a copy of its request or
107 proposal to each affected jurisdiction.

108 B. Each affected jurisdiction that is not a responsible public entity for the respective qualifying
109 transportation facility shall, within 60 days after receiving a request for comments from the responsible
110 public entity, submit any comments it may have in writing on the proposed qualifying transportation
111 facility to the responsible public entity and indicating whether the facility will address the needs
112 identified in the appropriate state, regional, or local transportation plan by improving safety, reducing
113 congestion, increasing capacity, and/or enhancing economic efficiency.

114 C. Any qualifying transportation facility, title or easement to which is held by the Commonwealth or
115 an agency or authority therefor and the rights to develop or operate which have been granted to the
116 private entity through a concession as defined in § 56-557, shall be subject to the provisions of Title
117 15.2 in the same manner as a facility of the Commonwealth, *mutatis mutandis*, except that such private
118 entity shall comply with the provisions of subsections B and C of § 15.2-2202 as they relate to the
119 affected jurisdiction's comprehensive plan.

120 D. *Prior to the execution of the comprehensive agreement, the responsible public entity shall obtain*

the approval of each affected jurisdiction whenever the development or operation of the qualifying transportation facility (i) adversely impacts local tax revenues or (ii) increases the fees or expenses that are paid by residents of the affected jurisdictions.

§ 56-566. Comprehensive agreement.

A. Prior to developing and/or operating the qualifying transportation facility, the private entity shall enter into a comprehensive agreement with the responsible public entity. The comprehensive agreement shall, as appropriate, provide for:

1. Delivery of performance and payment bonds in connection with the development and/or operation of the qualifying transportation facility, in the forms and amounts satisfactory to the responsible public entity;

2. Review of plans for the development and/or operation of the qualifying transportation facility by the responsible public entity and approval by the responsible public entity if the plans conform to standards acceptable to the responsible public entity;

3. Inspection of construction of or improvements to the qualifying transportation facility by the responsible public entity to ensure that they conform to the standards acceptable to the responsible public entity;

4. Maintenance of a policy or policies of public liability insurance (copies of which shall be filed with the responsible public entity accompanied by proofs of coverage) or self-insurance, each in form and amount satisfactory to the responsible public entity and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying transportation facility;

5. Monitoring of the maintenance practices of the private entity by the responsible public entity and the taking of such actions as the responsible public entity finds appropriate to ensure that the qualifying transportation facility is properly maintained;

6. Reimbursement to be paid to the responsible public entity for services provided by the responsible public entity;

7. Filing of appropriate financial statements in a form acceptable to the responsible public entity on a periodic basis;

8. Compensation to the private entity which may include a reasonable development fee, a reasonable maximum rate of return on investment, and/or reimbursement of development expenses in the event of termination for convenience by the responsible public entity as agreed upon between the responsible public entity and the private entity;

9. The date of termination of the private entity's authority and duties under this chapter and dedication to the appropriate public entity; and

10. Guaranteed cost and completion guarantees related to the development and/or operation of the qualified transportation facility and payment of damages for failure to meet the completion guarantee.

B. The comprehensive agreement shall provide for such user fees as may be established from time to time by agreement of the parties. Any user fees shall be set at a level that takes into account any lease payments, service payments, and compensation to the private entity or as specified in the comprehensive agreement. A copy of any service contract shall be filed with the responsible public entity. A schedule of the current user fees shall be made available by the private entity to any member of the public on request. In negotiating user fees under this section, the parties shall establish fees that are the same for persons using the facility under like conditions except as required by agreement between the parties to preserve capacity and prevent congestion on the qualifying transportation facility. The execution of the comprehensive agreement or any amendment thereto shall constitute conclusive evidence that the user fees provided for therein comply with this chapter. User fees established in the comprehensive agreement as a source of revenues may be in addition to, or in lieu of, service payments.

C. In the comprehensive agreement, the responsible public entity may agree to make grants or loans for the development and/or operation of the qualifying transportation facility from time to time from amounts received from the federal government or any agency or instrumentality thereof.

D. The comprehensive agreement shall incorporate the duties of the private entity under this chapter and may contain such other terms and conditions that the responsible public entity determines serve the public purpose of this chapter. Without limitation, the comprehensive agreement may contain provisions under which the responsible public entity agrees to provide notice of default and cure rights for the benefit of the private entity and the persons specified therein as providing financing for the qualifying transportation facility. The comprehensive agreement may contain such other lawful terms and conditions to which the private entity and the responsible public entity mutually agree, including, without limitation, provisions regarding unavoidable delays or provisions providing for a loan of public funds for the development and/or operation of one or more qualifying transportation facilities.

E. The comprehensive agreement shall provide for the distribution of any earnings in excess of the maximum rate of return as negotiated in the comprehensive agreement. Without limitation, excess

182 earnings may be distributed to the Commonwealth's Transportation Trust Fund, to the responsible public
183 entity, or to the private entity for debt reduction or they may be shared with appropriate public entities.
184 Any payments under a concession arrangement for which the Commonwealth is the responsible public
185 entity shall be paid into the Transportation Trust Fund.

186 *F. No comprehensive agreement shall include a non-compete or damage provision or any similar*
187 *provision requiring additional payments to the private entity to recover reduced revenue due to*
188 *improvements made by the Commonwealth to any other transportation facility.*

189 *G. Any changes in the terms of the comprehensive agreement, as may be agreed upon by the parties*
190 *from time to time, shall be added to the comprehensive agreement by written amendment.*

191 *G. H. Notwithstanding any contrary provision of this chapter, a responsible public entity may enter*
192 *into a comprehensive agreement with multiple private entities if the responsible public entity determines*
193 *in writing that it is in the public interest to do so.*

194 *H. I. The comprehensive agreement may provide for the development and/or operation of phases or*
195 *segments of the qualifying transportation facility.*

196 **§ 56-575.6. Affected local jurisdictions; approval of certain comprehensive agreements.**

197 *A. Any private entity requesting approval from, or submitting a proposal to, a responsible public*
198 *entity under § 56-575.4 shall notify each affected local jurisdiction by furnishing a copy of its request or*
199 *proposal to each affected local jurisdiction.*

200 *B. Each affected local jurisdiction that is not a responsible public entity for the respective qualifying*
201 *project shall, within ~~sixty~~ 60 days after receiving such notice, submit any comments it may have in*
202 *writing on the proposed qualifying project to the responsible public entity and indicate whether the*
203 *facility is compatible with the local comprehensive plan, local infrastructure development plans, the*
204 *capital improvements budget, or other government spending plan. Such comments shall be given*
205 *consideration by the responsible public entity prior to entering a comprehensive agreement pursuant to*
206 *§ 56-575.9 with a private entity.*

207 *C. Prior to the execution of the comprehensive agreement, the responsible public entity shall obtain*
208 *the approval of each affected jurisdiction whenever the development or operation of the qualifying*
209 *transportation facility (i) adversely impacts local tax revenues or (ii) increases the fees or expenses that*
210 *are paid by residents of the affected jurisdictions.*